UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 19

ALEXANDER MANUFACTURING, INC.

Employer

and Case 36-RC-5962

SHEET METAL WORKERS' INTERNATIONAL UNION, LOCAL NO. 16

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding,² the undersigned finds:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
 - 3. The labor organization involved claims to represent certain employees of the Employer.
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
- 5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

The parties filed briefs, which have been considered.

A hearing in this matter was held on January 13, 2000. Subsequently, pursuant to an Order Remanding Hearing, further hearing was held on February 15, 2000. I hereby receive into the record Board exhibits 1(g) and 1(h), 1(g) being an Affidavit of Service of Order Remanding Hearing and Notice of Hearing, and 1(h) being an Order Remanding Hearing and Notice of Further Hearing issued on January 28, 2000 in this matter and not received into the record by the Hearing Officer.

Included: All full-time and regular part-time fabrication, manufacturing, and material handling employees, including truck drivers, employed by the Employer at its Hogan Road, Gresham, Oregon, facility;

Excluded: All office clerical employees, guards and supervisors as defined by the Act, employees on the Employer's Board of Directors, and all other employees.

The Employer manufactures decorative wood and metal architectural elements at two facilities located in Gresham and Portland, Oregon. At hearing, the parties stipulated that the unit should include all fabrication, manufacturing, and material handling employees, including truck drivers. Petitioner seeks to represent only such employees employed at the Gresham facility. The Employer contends that only a two-facility unit is appropriate. Also at issue is whether under the Employer's employee stock ownership plan (ESOP) all employees are precluded from the right to collective bargaining under the Act. In addition, there is an issue as to the supervisory status of Troy Carey, the lead/project coordinator at the Gresham facility.

The Gresham facility (Hogan Road, herein) is a metal working facility. The Portland facility (199,³ herein) is a wood working facility. The Employer manufactures items such as decorative iron railings, hotel lobby and bar fittings, and wall panels. Past projects include various hotels and casinos in Las Vegas and other cities, renovation of the United States Ninth Circuit Court of Appeals, and the San Francisco Main Library. In addition to its Oregon facilities, the Employer has a regional office and 5,000 square foot warehouse in Las Vegas. Installation work is performed out of the Las Vegas office. No Las Vegas employees are involved herein.

The Employer is a corporation. All shares in the corporation are owned by an Employee Stock Ownership Plan (ESOP), which is administered by an Employee Stock Ownership Trust (ESOT). The ESOP was instituted in 1998 upon the retirement of Nicolas Alexander, at that time the majority stockholder in the Employer. The ESOP is a pension plan in which all employees are required to participate. All shares in the ESOP are held by the ESOT. Annually, on December 31, allocations of stock are made to employee accounts, based on the wages of the individual employees and the percentage of those wages designated by the employees to be contributed. Currently, 36.41 percent of the total stock has been allocated; the remaining 63.59 percent of the stock is held unallocated by the ESOT. Of the allocated shares, 19.25 percent has been allocated to managers and supervisors, and 12.81 percent has been allocated to employees sought by the petition. There are 146 participants in the ESOP, including 15 managers and supervisors.

At the present time, there are five Trustees. The Trustees vote all shares of stock in the corporation. On certain specified matters, i.e., merger, consolidation, recapitalization, reclassification, liquidation, dissolution, sales of substantially all assets of the business, or similar transaction, each participant is entitled to direct the Trustees as to the voting of shares allocated to the participant's stock account. In such instances, the Trustees can decide how to vote unallocated shares. On any other matters, including election of the Board of Directors, the Trustees may vote as they wish.

The current Trustees are: Daniel Spofford, executive vice president, marketing; William Klutho, president and chief financial officer; Donald Thoreson, vice president, operations; Patrick Murphy, regional manager of installation, Las Vegas; and Joe Vogt, assistant manager.

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³ "199" is an abbreviated version of the address of the facility, 802 SE 199th Street. The Hogan Road facility is at 1731 SE Hogan Road in Gresham.

The business of the corporation is conducted by the Board of Directors. Prior to February 13, 2000, the Board of Directors consisted of five persons: Nicolas Alexander; Spofford; Thoreson; Klutho; and Robert Buxton, vice president, production. There was also a three or four member non-voting advisory board which included Joe Vogt; Peter Clark, a journeyman metalworker; Mike McBride, an employee in the drafting department; and Patrick Murphy. The members of the Advisory Board participate in discussions in Board meetings. Most decisions in such meetings are made by consensus, and the Advisory members participate in reaching consensus.

Sometime before January 8, 2000, the Employer decided to expand the Board of Directors from five to eight members. On January 8, the then-current Board of Directors signed a "Unanimous Written Consent" which provided for the appointment of a nomination committee which would nominate four individuals for four of eight voting positions on the Board of Directors. The document also nominated four individuals, including Alexander, Thoreson, Spofford, and Klutho, to fill the other four positions.

On January 13, 2000, Klutho issued a memo addressed to "All Employee/Owners" stating that the current board of directors and the trustees of the ESOP had agreed to have four of the eight voting board positions elected by current employees. The memo states that, "if you are interested in having your name placed on the ballot, please sign the authorization below and return this letter to Eyvonne Bell in Accounting." At the bottom of the memo is a tear-off section which says, "Yes, please place my name on the ballot to be considered for a board position," followed by spaces for the printed name and signature of the individual. The memo provides that the four individuals who receive the most votes at the first annual shareholders' meeting on February 13 will become members of the board of directors.

Amended and Restated Bylaws of the corporation, which provide for an eight-member Board of Directors, four of which are nominated by a nominating committee consisting of three current employees of the corporation, were adopted later, on February 7, 2000, by the Board of Directors.

The nominating committee prepared ballots which were given to all employees, including managers and supervisors, listing 23 candidates, with instructions to vote for five. The four who received the highest number of votes were then formally nominated to positions on the Board of Directors, and the individual who received the fifth most votes was nominated to a position on the Advisory Board. In a "Fiduciary Policy Statement" dated February 7, 2000, the Trustees had pledged themselves to elect to the Board of Directors the four candidates nominated by the nominating committee. The four individuals thus elected to the Board of Directors were: Joe Vogt, Robert Buxton, Peter Clark, and Gary Behnke, an assistant manager. In addition, Brian VanZandt, a project manager, received the fifth highest number of votes from the employees, and was elected to the Advisory Board. The formal election took place at the shareholders' meeting on February 13, 2000. On February 14, the new Board met and appointed two more Advisory Board members: Patrick Murphy and Rich Poetzsch, a project manager.

It was not a secret ballot election. Each ballot had the name of the voter pre-printed at the top.

Buxton received 66 votes; Vogt, 60; Behnke, 41; and Clark, 33.

VanZandt received 32 votes.

Poetzsch is identified on the ballots as a journeyman cabinetmaker. However, he is identified on Employer exhibit 42 as a project manager. Likewise, Vogt is identified on the ballots as a leadman, cabinet, but is otherwise identified in the record as an assistant manager. The parties stipulated that project managers and assistant managers are statutory supervisors.

The current bylaws provide that if any vacancy occurs among the Board of Directors, the remaining Directors may, by majority, choose a successor. This provision applies to all Directors. The bylaws also provide for annual re-election of four Directors in accordance with the nominating procedure described above. In addition, the Amended and Restated Bylaws state that, "The shareholders entitled to vote for the election of Directors may remove a Director at any time, with or without cause." Thus, the Trustees can remove a Director at will.

The Trustees are primarily concerned with administering the ESOT. With respect to the corporation, their sole function is to vote the shares of stock at annual meetings or special meetings of the shareholders. The Trustees are appointed by the Board of Directors, and serve until they resign or are replaced. The Board of Directors can replace one or all of the Trustees by majority vote, upon 30 days' written notice

Stock ownership does not alone preclude the inclusion of employee stockholders in a collective bargaining unit. However, where stock ownership vests employees with "an effective voice in the formulation and determination of corporate policy," employee stockholders are stripped of their right to pursue bargaining representation. *Upper Great Lakes Pilots*, 311 NLRB 131 (1993); *Centurion Auto Transport*, 329 NLRB No. 42 (1999).

The Employer takes the position that its employees control the corporation, through their power to effectively elect four of the eight voting members of the Board of Directors. While those four members do not have a majority vote, they do evince "negative control," that is, the power to block any action by the other four Directors. The Employer's position relies upon such control, if any, possessed by its employees as a whole. However, Petitioner herein is seeking a unit smaller than one including the employees as a whole. The concern here, therefore, is whether the employees in the (otherwise) appropriate unit have the right to pursue collective bargaining. To resolve that concern, I must first make a determination as to the appropriate unit.

Unit Issue.

The Gresham facility, also known as Hogan Road, is a metal working shop. The facility was founded in the mid-1980s as Design Metals, Inc. (DMI, herein), a separate corporation owned in majority part by three of the corporate officers of the Employer. In about 1992, the DMI Corporation was dissolved and the business was absorbed by the Employer. However, the DMI name and logo are still in use in dealings with customers and vendors. The employees are under the over-all direction of Shaun Jackson, production manager, metal, and project managers Bradley Carlson and Gregory Benfit. Reporting to Jackson is Troy Carey, lead/project coordinator. There are about 17 employees at Hogan Road.

The Portland facility, also known as 199, is the wood working shop. There are two contract managers, Kevin Chism and Brian VanZandt, who oversee the production process at 199. The facility is divided into three areas, each overseen by an assistant manager: Gary Behnke in Area 1, Bob Purcell in Area 2, and Joe Vogt in Area 8.9 There are about 80 employees at 199.

The record is unclear as to the reporting relationship between Jackson on the one hand and Carlson and Benfit on the other. Apparently, Jackson is in charge of the manpower, so to speak, while Carlson and Benfit are in charge of specific projects, so that in effect Jackson supplies the manpower for Carlson's and Benfit's projects.

The record does not explain why Vogt's area is numbered "8" rather than "3."

Employees at Hogan Road fabricate and manufacture various decorative architectural elements, such as filigreed metal railings and window frames. They also fabricate metal ornaments which are later attached to wood cabinetry work such as desks, counters, and bars. About 20 percent of the metalwork produced is later integrated with wood work. In the process of manufacturing metal items, the Hogan Road employees use jigs and templates made of wood, either made by themselves or by 199 employees. Metalwork employees have different skills than those of the wood working employees, and the two groups use different tools in their work.

Hogan Road and 199 are located about four miles apart. The Employer's main offices are at the 199 facility, including the human relations function for both facilities. However, applicants for openings at Hogan Road apply at Hogan Road, and are interviewed there by Shaun Jackson. Jackson evaluates the Hogan Road employees. The Employer employs two maintenance employees who are located at 199 but also have responsibility for Hogan Road. All shipping of both metal and wood products is done from 199. Metal and wood working employees are classified as journeyman, or as craftsman 1, 2, or 3. Craftsman 3 is the starting position. Employees are evaluated every six months, and can be promoted to the next higher level at that time. Employees at both facilities are paid according to the same wage policy, and are eligible for the same benefits. Employees at Hogan Road get 45 minutes for lunch, while 199 employees get a half hour. A separate seniority list of Hogan Road employees is kept and has been posted by the Employer. The list is primarily used for vacation scheduling.

Time cards in evidence show that Hogan Road employees worked at 199, and 199 employees worked at Hogan Road, a total of 236 full shifts in 1998 and 49 full shifts in 1999. Also in evidence are sign-out sheets from the Hogan Road and 199 facilities which show occasions on which individuals from one facility went to the other for some part of a shift. However, the record does not clearly identify the status of such individuals as to whether they are rank-and-file employees, although it appears that on approximately 28 occasions rank-and-file employees from Hogan Road went to 199, and on approximately 60 occasions rank-and-file employees from 199 went to Hogan Road, for varying lengths of time less than a full shift, during 1999. There is no evidence as to the purpose of such visits.

There is no prior bargaining history with respect to the Hogan Road employees. Prior to a decertification election in 1994, the employees at 199 were represented by the Millmen's Union.

The Board considers a single facility unit to be presumptively appropriate, unless the employees have been merged into a more comprehensive unit by bargaining history, or the facility has been so integrated with the employees in another facility as to cause their single facility to lose its separate identity. Factors customarily relied upon for finding a single facility unit appropriate include geographic separation of facilities; substantial authority of local management; the absence of any bargaining history on a broader basis, lack of substantial interchange or transfer of employees; and whether any other labor organization is seeking to represent a more comprehensive unit. See, for example, *Passavant Health Center*, 313 NLRB 1216 (1994).

Here, the two facilities are about four miles apart. While DMI (Hogan Road) is no longer a separate corporation, the Employer continues to use its name and logo. The Hogan Road facility is separately supervised by Shaun Jackson who has authority to interview job applicants, who apply at Hogan Road for jobs there; and has authority to discipline employees, to select employees for layoff, to evaluate and promote employees, and assign and direct employees. The degree of interchange between Hogan Road and the 199 facility is not substantial: the 49 full shifts worked by employees of one facility at the other facility amount to about two-tenths of one percent of the total shifts worked in both

facilities.¹⁰ The evidence with respect to partial shifts during which employees from one facility spent time at the other facility is insufficient to establish that such evidence represents "interchange." There is no prior bargaining history involving the Hogan Road facility, and no other labor organization is seeking to represent the Employer's employees in a broader unit.

I conclude, therefore, that the presumption of the appropriateness of a single facility unit has not been overcome here, and I find that the unit herein is limited to employees at the Hogan Road facility.

Conclusion as to the status of employee stockholders.

Clearly, the 17 employees at Hogan Road do not have "an effective voice in the formulation and determination of corporate policy," as they are too few in number relative to the total number of employee stockholders. The fact that the sole rank-and-file employee on the Board of Directors, Peter Clark, is employed at Hogan Road does not remove his fellow Hogan Road employees from coverage under the Act, inasmuch as his candidacy required the support of employees at 199 in order to succeed. Clark, as are the other members of the Board of Directors, is a member-at-large, not the specific representative of the Hogan Road employees. His membership on the Board does not give the Hogan Road employees their own "voice" on the Board, or otherwise empower them with respect to the management policies of the Employer.

Further, the record establishes that the Hogan Road employees are treated in all respects as rank-and-file employees, except for their participation, along with others, in the process for nominating members of the Board of Directors. Thus, the Hogan Road employees have an interest in their status as paid workers that at least equals their proprietary interest in the Employer-corporation. I conclude, therefore, that the Hogan Road employees are employees within the meaning of the Act, and that it will effectuate the policies of the Act to direct an election among them. *Everett Plywood & Door Corporation*, 105 NLRB 17 (1953).

Moreover, I note that the "negative control" of the voting Board of Directors possessed by the employee stockholders is, in final analysis, illusory, inasmuch as the Trustees have the power to replace any member of the Board of Directors at any time. Therefore, even if the only otherwise appropriate unit were a unit including employees at both Hogan Road and 199, I would not find that the employees have been stripped of their right to engage in collective bargaining by virtue of their participation in the ESOP.

Inasmuch as Clark is a member of the Board of Directors, clearly a management group, on an equal footing with other members of such Board, I shall exclude him from the unit.

Supervisory Issue.

At hearing, Petitioner took the position that leads in the finish, mill, cut room, and maintenance departments at the 199 facility are statutory supervisors, but that Troy Carey, the lead/project coordinator at Hogan Road is not a supervisor. The Employer took no position on the leads at 199, but contends that Carey is a supervisor. The parties otherwise stipulated that swing shift leads in both the metal and wood shops are not statutory supervisors. In view of my conclusion above that the employees at the 199 facility are not included in the unit, it is unnecessary for me to make any findings herein regarding the supervisory status of leadmen at the 199 facility.

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Assuming 260 shifts per year per employee.

Carey has worked for the Employer for about five years, and is a journeyman metalworker. He has some authority over the other five leads at Hogan Road, in that he assigns them to jobs or projects. When a new job comes in, he meets with Shaun Jackson and they review the requirements for the job. Carey ascertains the number of hours that have been allocated for the job. He does something called a "print takeoff," which relates to determining how much material is needed for the job. He orders the materials. He chooses a lead and gathers a crew to work on the job. In doing so, he selects employees who are not already busy on other jobs. Carey has an office, which he shares with the other leads, and where he spends about 75 to 85 percent of his time. He has no involvement in hiring, firing, or disciplining employees. He is paid \$2.50 per hour more than the highest paid employee working under him. He works on the day shift. He can recommend discipline to Jackson, who usually follows his recommendation, but there is no specific evidence, nor any evidence that Jackson does not conduct an independent investigation. Jackson solicits Carey's opinion regarding layoffs and evaluations of employees. Carey testified that he and Jackson were generally in agreement on such matters, but no other evidence was offered in this regard. In Jackson's absence, Carey can allow an employee to leave work early. He and Jackson together lay out the work for the swing shift. Carey testified that he can decide that employees need to work overtime in order to get something done, but he offered no specific examples, nor did he explain why the work would not just be continued by swing shift employees.

Section 2(11) of the Act defines a "supervisor" as:

. . .[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The legislative history of Section 2(11) indicates that Congress intentionally distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire, or fire, discipline, or make effective recommendations with respect to such actions. Thus, a "leadman" or "straw boss" may give minor orders or directives or oversee the work of others, but he is not necessarily a part of management and a "supervisor" within the Act. *George C. Foss Co.*, 270 NLRB 232 (1984).

Carey is a "borderline supervisor." He has the appearance of authority: he works closely with Shaun Jackson in setting up projects, ordering materials, choosing a crew, and laying out work for the swing shift. He can recommend discipline, and Jackson consults him regarding layoffs and evaluations. He can allow an employee to leave work early, and can decide if overtime is needed. Further, he receives a higher wage than other employees, has five other leadmen reporting to him, and spends the majority of his time working at a desk. However, the record does not establish that any authority Carey exercises requires the use of independent judgment. In choosing a crew for a new project, he selects employees who are not already busy on another project. The record is silent with respect to the circumstances in which Carey can allow an employee to leave work early, or in which he can decide if overtime is needed, except on the basis that overtime may be necessary in order to complete a project. Likewise, the record is insufficient to establish that Carey has authority to effectively recommend discipline, layoff, or promotion. While Carey testified that Jackson usually follows his recommendations as to discipline,

In *Kent Products, Inc.*, 289 NLRB 824 (1988), the Board found a leadperson to be nonsupervisory where she had authority to allow employees to leave work early due to illness or medical appointments.

In *Big Star No. 185*, 258 NLRB 300 (1981), the Board found a produce manager to be non-supervisory where, if a produce delivery truck arrived late, he had authority to have his assistant stay on to help unload it.

and that he and Jackson usually agree on layoffs and promotions, such evidence is insufficient to establish statutory supervisory authority without evidence that Jackson implements Carey's recommendations without making any assessment of his own. *First Western Building Services*, 309 NLRB 591, 600 (1992), and cases cited therein. Carey's higher rate of pay and the amount of time he spends working at a desk are merely secondary indicia of supervisory status, which do not convert Carey to a supervisor where the record does not establish that he possesses one or more of the statutory indicia of supervisory status. *Northcrest Nursing Home*, 313 NLRB 491 (1993). Moreover, I note that Jackson is generally present in the facility at the same times that Carey is there.

Thus, I conclude that, on this record, Carey has not been shown to be a supervisor within the meaning of the Act.

There are approximately 16 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by SHEET METAL WORKERS' INTERNATIONAL UNION, LOCAL NO. 16.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be

of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the **new** Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before March 21, 2000. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted. To speed preliminary checking and the voting process itself, the names must be alphabetized.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by March 28, 2000.

DATED at Seattle, Washington, this 14th day of March, 2000.

/s/ CATHERINE M. ROTH

Catherine M. Roth, Acting Regional Director National Labor Relations Board, Region 19 2948 Jackson Federal Building 915 Second Avenue Seattle, Washington 98174

177-8580-3900 440-1720-0133 460-5033-2550-1700